

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

FRANCISCO GUTIERREZ
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-464
Case No. 88-09043

SSA No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. LA-33123

The Department appealed from that portion of the decision of the administrative law judge which held that the claimant was not ineligible to receive unemployment insurance benefits under section 1253(c) of the Unemployment Insurance Code beginning May 1, 1988 through August 6, 1988, as he was available for work.

STATEMENT OF FACTS

The claimant filed a claim for unemployment benefits effective May 1, 1988. The Department determined he was not legally present or authorized to work in the United States while earning wage credits of \$3,032.00 during 1987, the base period of his claim. The claimant applied for temporary residence status under the special agricultural worker (SAW) provisions of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603. He had been working in the United States since 1985.

On August 3, 1988, the Immigration and Naturalization Service (INS) issued a receipt acknowledging the claimant's application for temporary residence status and authorizing employment through November 1, 1988.

REASONS FOR DECISION

Section 1264 of the Unemployment Insurance Code provides, in part, as follows:

"(a) Unemployment compensation benefits, extended duration benefits, and federal-state extended benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law. . . ."

"(c) In the case of an individual whose application for benefits specified by subdivision (a) would otherwise be approved, no determination by the department, an administrative law judge or the appeals board that such benefits to such individual are not payable because of his or her alien status shall be made except upon a preponderance of the evidence."

Section 1253(c) of the California Unemployment Insurance Code provides that a claimant is eligible to receive benefits with respect to any week only if the claimant "was able to work and available for work for that week."

In Sanchez v. Unemployment Insurance Appeals Board (1977), 20 Cal. 3d 55, 141 Cal. Rptr. 146, the Supreme Court of California held that availability for work within the meaning of section 1253(c) "requires no more than (1) that an individual claimant be willing to accept suitable work which he has no good cause for refusing and (2) that the claimant thereby make himself available to a substantial field of employment."

In Sanchez, supra, the Supreme Court held that "once a claimant has shown he is available for suitable work which he has no good cause for refusing, the burden of proof on the issue of whether he is available to a 'substantial field of employment' lies with the Department."

In Alonso v. HRD (1975), 50 CA 3d 242, the Court held that a claimant who refused to present to the Department documentary evidence that he was legally eligible to accept employment in the United States was not available for work under section 1253(c) of the Code.

In Precedent Decision No. P-B-460 the Appeals Board held that wages for services performed on or after November 6, 1986 by a claimant who could make a prima facie showing of eligibility for lawful temporary residence status attained under IRCA shall be

deemed to have been earned while the claimant was "lawfully present for purposes of performing such services", within the meaning of Section 1264(a) of the Unemployment Insurance Code.

Here, the issue before us is whether the claimant was available for work under section 1253(c) of the code. We note that the claimant's status while working during the base period year 1987 was decided in his favor under section 1264 of the code. Thus, the claimant is entitled to have wage credits during 1987 used to establish his claim for benefits. However, a separate issue remains as to whether he was authorized to work during the weeks in question.

The Department contends on appeal that the claimant was not available for work prior to August 3, 1988, as he had no authorization to work from the INS. But the claimant has received authorization to work and the question, in our view, is whether such authorization is limited to establishing prospectively the claimant's availability for work.

We faced a similar issue in Precedent Decision No. P-B-460 with the question there being when a claimant might establish lawful status for wages earned in the base period. This was resolved by our finding that the claimant was lawfully present for purposes of performing services as of the effective date of IRCA, November 6, 1986, as IRCA provided for a stay of deportation and a mandatory work authorization prior to the May 5, 1987, beginning of the application period for aliens who could establish a probable case of eligibility for temporary residence status.

The claimant in this case established he received authorization to work from INS. We are persuaded that the claimant could have established his probable date of eligibility for a stay of deportation and a mandatory work authorization prior to or during the application period under IRCA. To hold otherwise would subject aliens who are entitled to establish a lawful presence effective November 6, 1986, to then be denied benefits by virtue of a lack of work authorization. Having achieved lawful status and having received work authorization, in our view, renders such claimants eligible for benefits. We regard this result as consistent with the remedial aspects of the unemployment insurance system. Hence, we find that the effective date of such work authorization is also effective as of Nov. 6, 1986, based upon the same legal considerations identified in Precedent Decision No. P-B-460.

We find further support for this position in the INS Handbook for Employers which provides that after May 31, 1987, the

employer has three business days from the date of hire to complete the requisite I-9 form for new employees. Therefore, the claimant could have been hired during the weeks in question but would have had to obtain authorization, for which he qualified, within three days of his employment.

Based on the record, we conclude the claimant was available for work under section 1253(c) of the code for the period in question, May 1, 1988 through August 6, 1988.

DECISION

The appealed portion of the decision of the administrative law judge is affirmed on modified rationale. The claimant is not ineligible for benefits under section 1253(c) of the code for the period of May 1, 1988 through August 6, 1988. He is entitled to benefits if otherwise eligible.

Sacramento, California, February 23, 1989.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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